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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1476

J. BRIAN GAFFNEY,

*Appellant,*

v.

THEODORE R. CUMMINGS, ET AL.,
NANCY ARONIE, ET AL., and
THOMAS J. MESKILL, Governor of the State of
Connecticut, ET AL.,

*Appellees.*

## BRIEF FOR APPELLEES, THEODORE R. CUMMINGS, et al.

### Questions Presented

1. Does the Board Plan, with a deviational range for the House of 7.83%, meet the constitutional standard of equality that legislative districts be "as nearly of equal population as is practicable," when the lower court recognized as valid and accurate an alternative plan with a deviational range of 2.61%?

2. Does the admitted political structuring employed by the Board, which sought to achieve a proportionalization of political parties' strength and which the lower

court found caused the deviations in the Plan, justify the Plan failing to comply with the constitutional standard of practicable equality?

3. Does the irrational consequences of the political structuring principle which caused bizarrely shaped districts, the unnecessary fragmentation of towns, the arbitrary creation of safe districts, and a gigantic attempt to maneuver the outcome of elections, not only disqualify political structuring as a justification for the deviations, but also cause an invalidation of the Plan itself?

4. Can the Plan, which is, on its merits, constitutionally defective, become constitutionally valid because of the form of the reapportionment board which created it?

5. May the Supremacy Clause be applied in this case so as to permit, a higher deviation among the legislative districts than the lowest that is practicable, in order to give the maximum respect to a state constitutional policy of preserving town lines and thereby achieve a better accommodation between the Federal and the Connecticut State Constitutions.

## Summary of Argument *

The District Court faithfully followed the leading cases of this Court on legislative reapportionment and its decision is justified by both the evidence and the law.

The District Court applied two criteria to determine the constitutionality of the Plan: (1) Whether or not the Plan met the standard of equality required under the Equal Protection Clause and (2) If it did not, whether the deviations of the Plan were justified by a rational state policy.

On both counts, the District Court found the Plan defective and held it "in violation of the Fourteenth Amendment to the Constitution of the United States" (Memo. of Dec., App., p. 8a in Appellees' Motion to Affirm).

### (1) Standard of Equality.

The District Court applied the standard that "deviations from absolute numerical equality which are more than minimum may not be allowed unless they are . . . the unavoidable result of attempts to obtain precise equality (Memo. of Dec., App. p. 9a in Appellees' Motion to Affirm). Essentially this is the same as the standard enunciated by this Court in *Reynolds* v. *Sims*, 377 U.S. 533 at p. 577 (1964) that legislative districts shall be "as nearly of equal population as is practicable" and later refined and made more exact in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969) that the state must make a good faith effort to "achieve precise mathematical equality," and there is permitted "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality."

---

* This summary of argument also states the operative facts determinative of this case.

The District Court found that the House districts in the Board Plan deviated from the perfect average by a maximum of plus 3.93% or 789 people and by a minimum of minus 3.90% or 784 people for a total deviation of 7.83% or 1573 people. It concluded these deviations were avoidable and a "closer approach to equality could be achieved with the materials at hand" (Memo. of Dec., op. cit. at p. 7a).

In support of this conclusion, the lower court referred to Plaintiffs' Exhibit 23 (Single App., p. 181). This exhibit was a reapportionment plan submitted to the court by the Appellees, for the House with the same number of seats as the Board Plan and based on the same census material as available to the Board. It was prepared by a conceded expert in Connecticut reapportionment and neither the expertise of the author nor the accuracy of Plaintiffs' Exhibit 23 was ever questioned by the Appellant. This plan demonstrated that the deviations could be reduced to plus 1.6% above equality and minus 1.01% below equality for a total deviation of 2.61%. When these deviations are compared with the 7.93% deviation of the Board Plan, the lower court was justified in concluding that the Board had not complied with the requirement of practicable equality.

The Appellant has sought in his brief to escape the legal consequences of the Plan's failure to meet the constitutional requirement of practicable equality by a number of adroit arguments.

(a) He claims that because the deviations from equality in the House Plan were less than the average population of the census units utilized in the creation of the Plan (1100 people) the deviations are unavoidable. However, the census unit average (which is simply an average arrived at by dividing the population of the state of 3,012,170 by the number of census units then available to the Board of 2,746) has no statistical meaning in itself and has no opera-

tive utility in the development of a reapportionment plan. The significant fact is not the average population of census units but the population of the smallest census units available to the Board and whether or not there was a sufficient number of these units to create a Plan. This is so because districts are created by adding census units together. Since there were a sufficient number of census units with a population of below 300 people (240 of such units to make 151 legislative districts) there was no difficulty whatever in achieving a population deviation of significantly less than the census unit average of 1100 people and than the population deviation in the Plan of 800 people.

(b) The Appellant argues that this Court should adopt a *de minimis* rule as a ground for ignoring the Plan's 7.83% deviation. However, when such a *de minimis* rule was urged in *Kirkpatrick*, this Court specifically rejected it on the grounds that there was no non-arbitrary way to pick a cut-off point and, moreover, if one were established, it, rather than precise equality, would become the target at which reapportioning authorities would aim.

(c) The Appellant argues that the Court should adopt a rule of presumptive constitutionality in the one-man, one-vote cases. This Court has refused to apply such a presumption in cases involving basic civil rights but rather has imposed upon the states in such cases, the obligation to explain why it is denying to its citizens these fundamental rights.

(d) The Appellant finally argues that the standard of equality most forcefully announced in *Kirkpatrick* should be changed. The complete answer to this contention is the extraordinary success achieved by the application of the *Kirkpatrick* standard throughout the country.

This success is dramatically revealed by a comparison of the range of deviations * approved by lower courts and established by reapportioning authorities in the period prior to *Kirkpatrick* (1969) and in the period after *Kirkpatrick*.

*Deviations Prior to 1969*

| *Range of Deviation*: | *Number of States*: | *Percentage of States* |
|---|---|---|
| | *Senate*: | |
| Under 1% | 0 | 0% |
| 1-5% | 1 | 2% |
| ... | ... | ... |
| Over 15% | 44 | 88% |
| | *House*: | |
| Under 1% | 0 | 0% |
| 1-5% | 1 | 2% |
| ... | ... | ... |
| Over 15% | 48 | 96% |

*Deviations after 1970*

| *Range of Deviation*: | *Number of States*: | *Percentage of States* |
|---|---|---|
| | *Senate*: | |
| Under 1% | 3 | 6.7% |
| 1-5% | 21 | 46.7% |
| ... | ... | ... |
| Over 15% | 8 | 17.8% |
| | *House*: | |
| Under 1% | 4 | 9.5% |
| 1-5% | 16 | 38.1% |
| ... | ... | ... |
| Over 15% | 10 | 23.8% |

* As used in this brief, "range of deviation" is the sum of the percentage deviation the largest and smallest district vary from equality. Thus, if the largest district is 5% more populous than the population of the perfect average district and the smallest district is 3% less populous, then the range of deviation is 8%.

In the period prior to 1969, only 2% of the states had a deviational range for either their senate or their house within the 1-5% bracket and 88% of the states for the senate and 96% of the states for the house had deviational ranges of over 15%.

However, after the *Kirkpatrick* decision in 1969, the situation dramatically changed. Lower courts have applied the *Kirkpatrick* rule to state legislative reapportionment and they have specifically refused to adopt any *de minimis* rule. The result has been that in the reapportionments since 1970, 53.4% of the states for the senate and 47.6% for the house, have achieved a deviational range of 1-5%. Moreover, since 1970, only 17% of the states for the senate and 23% of the states for the house have deviations in excess of 15%.

This Court's insistence upon equality through the application of the *Kirkpatrick* standard is the primary cause for this remarkable achievement.

**(2) Lack of Justification for the Deviations.**

In this case, the deviations having been found to be avoidable, the burden then shifted upon the state to offer an explanation.

The evidence revealed that the Board creating the Plan was obsessed with a desire to politically structure the districts in order to assure that each political party elected the number of its candidates to each house of the legislature in proportion to each party's total of all the votes all its candidates received in all individual district elections.

The District Court found that political structuring caused the deviations in the Plan and that, if it were eliminated, a closer approach to equality could have been achieved. The District Court further found that political structuring was not a legitimate state interest that could

justify the deviations. The court was totally warranted in so holding.

This Court has precisely held in *Kirkpatrick* that the problems created by partisan politics, by a desire to achieve bipartisan cooperation, or by a putative purpose of avoiding partisan gerrymandering, do not justify population deviations in a reapportionment plan.

The underlying reason for rejecting these political excuses is that they open the door too wide to subterfuges for failing to achieve the standard of equality required by the Constitution.

The Appellant argues most persistently in his brief that the political structuring employed by the Board should be permitted to justify the Plan's deviations because of the purity of the Board's motives to achieve a "fair" representation between the political parties. The answer to this contention is that there is no way of defining the term "fairness" nor determining by any objective testing whether or not the Board achieved this putative objective. In fact, based upon the use of the Plan in the 1972 election, the Plan did not achieve the proportionalization claimed by the Board between the state-wide total vote of each party's candidates and the number of legislators elected. But regardless, since "fairness" can neither be tested nor defined, it, like the practical political excuse, simply opens the escape hatch too wide if allowed to justify the Plan deviating from the requisite standard of equality.

Moreover, were this Court to accept the notion of justifying deviations on the basis of "fair representation" between the political parties, it would involve itself in "political questions" which are beyond judicially created standards or judicial management.

Essentially the whole notion of political structuring adopted by the Board, rests upon the premise that there is a meaning to the statewide total of all the votes cast for each political party's candidates in single district elections. In fact, that total has no meaning at all and is not a rational number. The use of that total as the basis for proportionalizing parties' strength, renders the political structuring principle itself an irrational standard. Its pervasive use in the development of the Plan created irrational results. Among them were bizarrely shaped districts, unnecessary fragmenting of town lines, and the arbitrary creation of safe districts. Moreover, the attempt to structure districts to achieve particular political ends unrelated to the one-man, one-vote doctrine, rendered the Plan a gigantic **gerrymander.**

Clearly, political structuring cannot be a justification for the deviations of the Plan. Furthermore, the widespread application of this irrational principle and the irrational results and consequences it caused, warrant invalidating the Plan.

Approving the Board's political structuring methods in this case would have the national consequence of sanctifying the mutilation of legislative districts in other states throughout the country and authorizing more effective methods for manipulating the outcome of elections.

The Plan having failed to meet constitutional requirements cannot be raised to constitutional validity by the form of the reapportionment board which created it. The Plan must be judged on its merits and the focus should be not on *who* created the Plan but on *what* they created.

In fact the evidence reveals the Plan was not the product of a deliberative bipartisan reapportionment board acting non-politically. Rather the Board functioned as a one-man operation of one member assisted by his counsel. There

were no meetings whatsoever by the Board on the House Plan and it never met as a Board to approve the entire Plan. The tie-breaking member was handed the Plan on the last day of the constitutional deadline and had no choice but to accept it. The Board consequently is not entitled to a presumption of fairness and the criteria for determining the constitutionality of its work must be the same as applied in *Reynolds, Swann,* and *Kirkpatrick*.

If this Court reinterprets its prior decisions so as not to require that a reapportionment plan for state legislatures comply with the stringent *Kirkpatrick* standard of equality, then this Court should apply the Supremacy Clause so as to allow deviations higher than in the Board Plan in order to give the maximum feasible effect to the valid state policy, expressed in the Connecticut State Constitution, of preserving town lines. This Court has long recognized that whenever possible, accommodation should be achieved and conflict minimized in the interpretation of the provisions of both the Federal and State Constitutions.

## ARGUMENT

### I. The Board Plan of Apportionment fails to comply with the Federal Constitutional requirement under the Equal Protection Clause that legislative districts be "as nearly of equal population as is practicable."

#### A. The Constitutional Foundation of the one-man, one-vote doctrine.

When a legal doctrine becomes as encrusted with the pronouncements and prophecies of the pundits as the one-man, one-vote doctrine, it is helpful to start with a review of the fundamental constitutional grounds upon which this Court's initial decisions were made.

Reapportionment cases basically deal with the right of citizens to participate in the process of electing their government. The one-man, one-vote doctrine is rooted in the "constitutionally protected right to vote". *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964). That right includes "the right to have the vote counted at the full value without dilution or discount". Id. at p. 555, quoting Justice Douglas' dissent in *South* v. *Peters*, 339 U.S. 276, 279 (1950). "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting free exercise of the franchise." *Reynolds* at p. 554.

Diluting the weight of a vote because of the place of residence of a citizen constitutes invidious discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment just as much as the denial of the right to vote because of race (*Reynolds* at p. 566).

The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny any *person* within its jurisdiction equal protection of the law." Thus, the

right impaired by an apportionment scheme which violates the Equal Protection Clause is "*individual* and *personal* in nature" (Reynolds at p. 561).

The individual and personal quality of the right to an equally weighted vote is echoed in *Lucas* v. *Colorado Gen. Assembly*, 377 U.S. 713, 737 (1964), wherein this Court noted with approval the dissent of Judge William E. Doyle, saying: "The rights here asserted are the right of *individual* plaintiffs to have their votes counted equally with those of other voters" (emphasis added). See *Lisco* v. *Love*, 219 F. Supp. 922, 944 (D. Colo. 1963).

We emphasize that the one man, one vote doctrine, through the mechanism of the Equal Protection Clause, equates the fundamental right to vote with the personal right to an equally weighted vote[1] for two purposes: first, to justify the standard of equality developed by this Court; and second, to distinguish this *personal* right from a *group* right to representation. It is this personal and individual right that the Appellees have asserted throughout this case.

On the other hand, the theme running through Appellant's brief is that a correlation must be achieved between "the form of apportionment" (which he likens to equality in districting) and "the function of representation" (which he likens to a balance of political party strength in the legislature). However, representation is a very complex concept and has implications unrelated to equality of the vote.[2] It involves the role of the legislator in fulfilling the will of his constituents. Representation, as used by the Appellant, also concerns the division of political power between the political parties.

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[1] See, O'Rourke, *Reapportionment, Law, Politics, Computers, A.E.I., Dom. Aff. Studies*, No. 1 Feb. 1972, at Page 18.

[2] See Irwin, *Representation and Election: The Reapportionment Cases In Retrospect*, 67 Mich. L. Rev. 729 (1969) p. 747-752.

At this point, it is sufficient to emphasize that the right of an individual to an equally weighted vote and the right of any interest, including a political party, to representation belong to essentially different constitutional orders. Concern for representation would lead this Court into political questions which are beyond judicial standards to determine.[3] The Appellant's attempt to lead the Court in that direction is a siren call to disaster.

Rather, this Court, in the application of the one-man, one-vote doctrine, has acted upon the suffrage question alone, asserting the constitutional right of each citizen to an equally weighted vote. The furtherance of that right is precisely what this Court has accomplished in the reapportionment cases, and no more. That is enough. The great success that this Court has achieved should be both recognized and acclaimed.

**B. The Standard of Equality.**

At the outset, it is worth stating the standard of equality which this Court has utilized in the one-man, one-vote cases. From the beginning of the reapportionment litigation, this Court has, without variation, held that equality of population must be the touchstone against which any plan of districting must be measured. In *Wesberry* v. *Sanders,* 376 U.S. 1, 7-8 (1964), the Court held that "as nearly as is practicable, one-man's vote in a congressional election is to be worth as much as another's."

The same standard was applied to state legislative plans of apportionment in *Reynolds* v. *Sims, supra*, wherein this Court held that: ". . . the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of a legislature, *as nearly of equal population as is practicable*" (emphasis added). 377 U.S. at p. 577.

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[3] *Id.*

Then, in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969), this Court indicated that as equal as practicable meant that the state must make a good faith effort "to achieve precise mathematical equality", and there is permitted "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality . . .".

The District Court below in this case adopted precisely the same standard. The Court said: "The constitutional principle of the vote cases appears to be that deviations from absolute numerical equality which are more than minimal may not be allowed unless they are . . . the unavoidable results of attempts to obtain precise equality . . ." (Memo of Decision, App. p. 9a in Appellees' Motion to Affirm).

**C. Failure of the Plan to achieve practicable equality.**

The District Court found that the House districts[4] in the Board Plan deviated from the perfect average by 3.93% above the average and by 3.90% below the average for a total deviation from the largest to the smallest district of 7.83%.[5] It concluded that these deviations did not meet the standard of equality adopted by this Court. The evidence in this case justifies that finding.

---

[4] Throughout the trial of this case and in this appeal, no issue has been made of the deviations in the Board's Senate districts. The lower court was correct in declaring the entire Plan unconstitutional when the deviations in one House did not meet the requisite standard. It was following the rule of this Court that "a court in reviewing an apportionment plan must consider the scheme as a whole." *Burns* v. *Richardson*, 389 U.S. 73, 83 (1966). In accord is *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964).

[5] In the recent case of *Connor* v. *Williams*, 404 U.S. 549 (1972), this Court refers to percentage deviations in a reapportionment plan as the sum of (a) the percentage that the largest district varies from precise equality, plus (b) the percentage that the smallest district varies from precise equality. We will follow that practice in this brief and call that sum the range of deviation.

The Appellees submitted a plan for House districts in which the deviations did not exceed a high of 1.6% above the ideal and a low of 1.01% below the ideal or a total deviation from the largest to the smallest of 2.61% (Plaintiffs' Ex. 23, Single App. p. 181; Testimony of Vocelli, Single App. pp. 229, 230). This plan was based upon the same census data as was available to the Board. It was prepared by Thomas Vocelli, who had worked on Connecticut reapportionment for the legislative reapportionment committee, for the eight man commission and assisted the Board (Single App. pp. 201-202). He was qualified at the trial as an expert and accepted as such by the lower court and by the Appellant. That the District Court gave credence to Appellees' 2.6% plan as valid evidence of how the districts could achieve substantial equality is indicated by the Court specifically referring to Plaintiffs' Ex. 23 in its opinion (Memo of Dec., Single App. p. 7a in Appellees' Motion to Affirm). Appellees' 2.6% plan had been submitted to Appellant's counsel at least two weeks before the trial. They never contested its accuracy or introduced any evidence to contradict it.

Appellees' plan with a total deviation of 2.61% thus established that the deviation in the Board Plan of 7.83% was avoidable if an effort had been made to do so.

The Appellant seeks to escape the failure of the Board Plan to achieve practicable equality by a series of defensive arguments. He claims that: (a) the available census data made the deviations in the Plan unavoidable; (b) this Court should establish and apply a *de minimis* rule as a ground for ignoring the deviations; (c) this Court should presume the constitutionality of the Plan in order to shift the burden onto the Appellees to show they were specifically hurt by the deviations; and finally (d) the standard of equality itself should be changed.

All of these arguments are without merit.

**D. The 7.8% range of deviation in the Board Plan was avoidable and the available census data did not preclude substantially smaller deviations.**

Appellant argues that the average population census units available to the Board was 1,100 persons, and since the deviations of the Plan do not exceed 800 people, the Plan does as well as can be expected. In effect, he is saying that the deviations below the census unit average are "unavoidable".

There is a kind of persuasive appeal to the Appellant's claim: Deviations below "census unit averages" should be acceptable. The Court is spared fixing a definite percentage figure which Appellant is shrewd enough to perceive this Court is reluctant to do. However, the Appellant is really applying the advertising man's trick of obscuring meaning by a technical phrase.

Analysis reveals the speciousness of the Appellant's claim. The census unit average of 1,100 people is arrived at by dividing the population of the state (3,012,170) by the number of census units (2,746). The average has no statistical meaning in itself, because it is too gross a figure. Moreover, the average has no operative utility in the creation of legislative districts. Districts are created by adding census units together. The significant fact is that the total number of census units (2,746) far exceeds the number of districts (151) created by the Plan. The smallest census units thus become the working tools for achieving districts of ideal population. There are a sufficient number of these (165 units being below 200 people and 240 units below 300 people (App. B, Appellant's Brief, pp. 94-95)) to do the job.

In fact, this is precisely what occurred in the creation of the plans by the Board and by the Appellees. The Board achieved a maximum population deviation of 800 persons as opposed to the census average of 1,100. The Appellees sub-

mitted a plan (Appellees' Ex. 23) with a 2.6% range of deviation in which the maximum deviation was 321 people, and all but 4 of the 151 districts had a deviation of 200 people or less.

Moreover, the Appellees' plan does not cut census units which Appellant erroneously claims has to be done to achieve closer equality than the Board's Plan. (See Testimony of Vocelli, Single App. at p. 235).

Thus, the Appellant's census unit average has no significance statistically, and this Court should not give it any legally.

Moreover, speculation about the inaccuracy of the census should not excuse the Plan from approaching equality. All of the reapportionment cases decided in the late 1960's were based upon the 1960 census. The possibility of census error was not considered a justification for the deviations in plans under consideration. Although Justice Fortas, in his separate opinion in the *Kirkpatrick* case, made the point about possible census error, this Court, nevertheless in deciding that case in 1969, invalidated a plan with a range of deviation of 5.9%. The point this Court has made many times is that it must rely on the census material because that is the most accurate information available.

**E. The Court has heretofore refused to adopt a *de minimis* rule and should refuse to do so in this case.**

Appellant claims that the deviation of 7.83% in this case is *de minimis* and should be ignored by this Court. What is clear from the present state of the law is that there is no *de minimis* approach to variations from equality under the one man, one vote doctrine.[6]

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[6] While there is dicta in *Swann* v. *Adams*, 385 U.S. 440, 444 (1967) to the effect that "*de minimis* deviations are unavoidable", it is apparent that the Court meant that only unavoidable minor deviations arising from the nature of the census information are *de minimis*. This interpretation is consistent with *Kirkpatrick's* subsequent handling of the rule.

In *Kirkpatrick*, the Court specifically rejected a *de minimis* rule which was being urged upon it. The Court said:

> "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'nearly as practicable standard.'" 394 U.S. at 530.

The refusal to accept a *de minimis* population variance was based on two grounds: (a) there is no non-arbitrary way to pick a cut-off point at which population variances would magically become *de minimis* and (b) once a *de minimis* percentage was established, it would rapidly become the variation from equality that reapportionment authorities would focus upon attaining. *Id.* at p. 531. The Court then reasserted the requirement, enunciated in *Swann*, that the burden is on the State to "justify each variance, no matter how small." *Id.* at p. 531.

The *de minimis* rule would not achieve the finality in the litigation of reapportionment cases which the Appellant claims. If a *de minimis* deviation is not expressed as a fixed percentage, there will still be litigation over what is a *de minimis* deviation, and there will still be litigation at the boundary line. Acceptable minimum deviations simply raise the threshold of the dispute. What will terminate litigation is rejecting an imprecise leeway from equality and insisting upon as precise equality as the census data will allow.[7]

Moreover, the establishment of a *de minimis* rule would cloak the gerrymanderer with presumptive legitimacy within the parameters of the predetermined deviation, permitting him to run his lines all over the reapportionment map, safe

[7] See Dixon, *Democratic Representation: Reapportionment in Law and Politics* (1968): "When given clear mathematical guidelines, few legislatures have failed to accomplish reapportionment" (p. 18).

in the knowledge that he was beyond judicial scrutiny if he stayed below the magic figure.

This Court's refusal to enunciate a *de minimis* rule has had a tremendous influence on forcing lower courts to achieve close equality. In case after case, the district courts cite the absence of a *de minimis* rule as a reason for insisting upon almost precise equality.[8]

The real impact of the adoption of a *de minimis* rule would be to excuse the state from being required to articulate the reasons for the deviations, *Swann* v. *Adams, supra,* 385 U.S. at 443, 445; *Kirkpatrick* v. *Preisler, supra,* 394 U.S. at 530, 531. However, when fundamental civil rights are impaired, such as freedom of speech[9] or religion,[10] this

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[8] *Sims v. Amos* 336 F. Supp. 924 (N.D. Ala. 1972), range of deviation in the house, 2.23% and in the senate, 1.39%; *Kelly* v. *Bumpers,* 340 F. Supp. 568 (E.D. Ark. 1972), range of deviation in the senate, 3.5%; *Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839 (N.D. Ill. 1971), districts in all plans submitted to the Court varied by less than 1%; *Beens* v. *Erdahl,* 336 F. Supp. 715 (4th Div., Minn. 1972), reversed on other grounds, sub nom. *Sixty-Seventh Minnesota State Senate* v. *Beens,*—U.S.—, 32 L.Ed 2d 1 (1972), range of deviation in the senate, 2.53%, and the house, 3.94%; *Ferrell* v. *Oklahoma,* 339 F. Supp. 73 (W.D. Okla. 1972), deviations were less than 0.5% above and below the ideal, the total variance of the districts being .938%; *Noun* v. *Turner,* 193 N.W. 2d 784 (Iowa 1972), range of deviation in the senate 3.2% and in house 3.8%; *Noun* v. *Turner,* 196 N.W. 2d 209 (Iowa 1972), the final plan adopted by the Court had deviations of 1/11 of 1% for the house and 1/20 of 1% for the senate.

[9] *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958): "Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the state bear the burden of persuasion to show the appellants engaged in criminal speech." See also, *Freedman* v. *Maryland,* 380 U.S. 51 (1964), placing the burden on the state of showing that an allegedly obscene film is an unprotected expression of free speech, and *Blount* v. *Rizzi,* 400 U.S. 410 (1971) prohibiting the post office from barring materials from the mail unless its censor first shows them to be unprotected expression.

[10] In *West Virginia Board of Education* v. *Barnett,* 319 U.S. 624, 639 (1924) the flag salute case, it was held that restrictions

Court has required the state to justify any deviation from the constitutional mandate. The reapportionment cases merely reaffirm the principle that the right to vote is one of those basic freedoms which go to the heart of the political processes that make a free democratic society work and, therefore, any tampering with that right must be justified by those who do so.

No great burden is imposed upon the state to come forward with an explanation when a citizen is deprived of an equally weighted vote. On the other hand, excusing the state from explanation gives the architect of districting a free hand and permits him to pursue any sort of irrational state policy in causing deviations below the established *de minimis* level. Such a rule would give rise to the legitimate question of what has the state to hide and would lower the legitimacy of the electoral process in the eyes of the voters.

**F. There is no presumption of constitutionality in one-man, one-vote cases, and none should be adopted here.**

Appellant urges this Court to adopt a rule of presumptive constitutionality in this case as a device for blocking further inquiry into the reasons for the deviations and as a device for shifting the burden on the Appellees to prove particularized discrimination. This is a variation on the argument for a *de minimis* rule and should be rejected for the same reasons as rejecting that rule.

However, there are even more fundamental constitutional reasons for rejecting the presumptive constitutionality suggestion.

With respect to that presumption, this Court has recognized the distinction between state action related to regulation of economic or social welfare matters and state action

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on freedom of religion would be allowed only "to prevent grave and immediate danger to interests which the state may lawfully protect".

which infringes upon "basic civil rights of man", *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).[11]

As to the state regulation of economic matters, there is a general presumption of constitutionality which can only be overcome by showing that statutory classification and the different treatment under that classification are based upon real "differences that are reasonably related to the purposes of the act", *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

As to state action which impinges upon the preferred freedoms, once unequal treatment is shown, the presumption of constitutionality is reversed, and the Equal Protection Clause requires the state to offer explanation which will be subject to "strict scrutiny" and will be sustained only upon showing of compelling justification. *Skinner* v. *Oklahoma*, *supra*., p. 541.[12]

The right to vote "being a fundamental political right, because preservative of all rights", *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) is certainly one of these basic civil rights. In *Lucas* v. *Colorado Gen. Assembly*, supra, 377 U.S. at p. 736, this Court equated the constitutional right to an equally weighted vote to the "fundamental rights" of "life, liberty and property", citing *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 638 (1943).

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[11] See McKay, *Political Thickets and Crazy Quilts; Reapportionment and Equal Protection*, 61 Mich. L. R. 645 p. 666-681 (1963).

[12] In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1937), the Court recognized that certain of the freedoms guaranteed by the Bill of Rights enjoyed a special place in the hierarchy of constitutional rights in that they impact directly on our fundamental political processes. Included in these special freedoms are the right to vote, the dissemination of information, the establishment of political organizations and the right of peaceable assembly. Any attempt to alter these basic rights will be subjected "to more exacting judicial scrutiny . . . than are most other types of legislation".

In one man, one vote cases, the population inequality of the districts itself establishes the invidious discrimination violative of the Equal Protection Clause without the challenger of the plan having to prove any further or particularized discrimination.[13]

On the issue of burden of proof, the one man, one vote cases such as *Reynolds*, *Swann* and *Kirkpatrick* are completely distinguishable from the alleged racial discrimination cases arising from multi-member districts typified by *Fortson* v. *Dorsey*, 379 U.S. 433 (1965); *Burns* v. *Richardson*, 384 U.S. 73 (1966); and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

In the latter cases, in every instance, legislative districts were conceded to be of equal population. As a result, these cases did not raise the one man, one vote issue. Rather, the claim was that multi-member districts caused racial discrimination and this Court held that such a claim had to be specifically alleged and proven.

It need hardly be pointed out that were the burden of proof imposed in *Whitcomb* applied to the one man, one vote doctrine, that doctrine would never have reached the point of fruition and achieved the tremendous gains it has.

**G. The *Kirkpatrick* rule is applicable to state legislative reapportionment and should not be modified.**

Appellant, in an effort to avoid the strict standard of equality required by *Kirkpatrick*, argues that that case should not be applied to state reapportionment or, in the alternative, if it must, that the standard itself should be changed.

*Kirkpatrick*, involving congressional reapportionment, is premised on Article I, Section 2 of the United States Con-

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[13] See O'Rourke, *Reapportionment: Law, Politics, Computers* op. cit., p. 28.

titution. The applicable constitutional provision, however, is not a reason for refusing to apply *Kirkpatrick* to state reapportionment cases which are, of course, premised upon the Equal Protection Clause of the Fourteenth Amendment. Both congressional and state reapportionments raise precisely the same central issue: the right of an individual to an equally weighted vote. The issue being the same, the standard of equality should also be the same. There is just no intellectual or practical reason for making the distinction between them.

The *Kirkpatrick* rule has been applied by both federal and state courts in many state legislative reapportionment cases since 1969.[14] As will be shown below, it has achieved extraordinary success.

The only reason advanced by the Appellant for urging this Court to abandon *Kirkpatrick* is that the tightness of the *Kirkpatrick* standard of equality encourages gerrymandering. The short answer is the one given pungently by Justice Brennan in *Kirkpatrick* (at p. 534) that opportunity for gerrymandering is even greater when the districts are unequal.

**H. The strongest argument in favor of the standard of practicable equality is that it has worked to achieve equal legislative districts in a majority of the states throughout the country.**

The test of a legal principle is whether or not it achieves its purpose. As indicated above, the one man, one vote doctrine asserts the constitutional right of each citizen to an equally weighted vote.

Although the standard of practicable equality was expressed in *Reynolds* in 1964, it was done with a certain diffidence and seemed to leave open loopholes to avoid com-

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[14] See cases cited in footnote 8 supra. The New York Court of Appeals recently said in *In the Matter of Schwartz* v. *Rockefeller*,——N.Y. 2d—— (Ct. of Appeals, decided Dec. 29, 1972): "Indeed, we are of the opinion that the standards for state legislative and congressional apportionment are substantially the same." (Unreported Memo of Dec., p. 4).

pliance. That same standard, when expressed in *Kirkpatrick,* indicated this Court meant it and was going to insist upon compliance. This Court noted in that case that ". . . a state legislature which tries, can achieve almost complete numerical equality among all of the state's districts." *Kirkpatrick,* p. 532.

It is fascinating to compare the ranges of deviations[15] approved by the courts and established by reapportionment authorities in the period prior to *Kirkpatrick* with the period after *Kirkpatrick.*

From 1964 to 1969, the lower courts often approved deviations in legislative reapportionment cases in a range of over 15%. Typical of these cases are the following:

| | *Range of Deviation:* |
|---|---|
| *Stout* v. *Bottorff,* 249 F. Supp. 488, 494 (S.D. Ind., Indianapolis Div. 1965) .. .. .. | 23.99% Senate<br>23.51% House |
| *Nolan* v. *Rhodes,* 251 F. Supp. 584 (S.D. Ohio E.D. 1965) .. | 30.00% |
| *League of Nebraska Municipalities* v. *Marsh,* 253 F. Supp. 27 (D. Neb. 1966) .. .. .. | 19.65% |
| *Dungan* v. *Sawyer,* 253 F. Supp. 352 (D. Nev. 1966) .. .. | 21.2% Senate<br>22.4% House |
| *Banister* v. *Davis,* 263 F. Supp. 202 (E.D. La. 1966) .. .. | 15.00% |
| *Toombs* v. *Fortson,* 277 F. Supp. 821 (N.D. Ga., Atlanta Div. 1967 .. | 20.00% |

[15] Range of deviation, as used here, is defined in footnote 5 supra; i.e. the *sum* of the percentage differences from equality of the largest and smallest districts.

The lower court decisions were reflected in the range of deviations of plans adopted by all the states prior to 1969. The following chart [16] indicates the range in that period:

*Deviations Prior to 1969:*

| *Range of Deviation:* | *Number of States:* | *Percentage of States:* |
|---|---|---|
| | *Senate:* | |
| Under 1% | 0 | 0% |
| 1-5% | 1 | 2% |
| 5-10% | 2 | 4% |
| 10-15% | 3 | 6% |
| Over 15% | 44 | 88% |
| | *House:* | |
| Under 1% | 0 | 0% |
| 1-5% | 1 | 2% |
| 5-10% | 0 | 0% |
| 10-15% | 1 | 2% |
| Over 15% | 48 | 96% |

Thus, prior to 1969, only 2% of the states had a deviational range for either their senate or their house within the 1-5% bracket and 88% of the states for the senate and 96% of the states for the house had deviational ranges of over 15%.

After the *Kirkpatrick* decision in 1969, the situation almost instantaneously changed. The decisions of the lower courts in almost all cases applied *Kirkpatrick*, specifically stated that there was no *de minimis* rule and held that, except when adequate justification was shown, deviations

[16] This chart is compiled from the table entitled "Apportionment of Legislatures" printed in Council of State Governments, "The Book of States: 1968-1969" Vol. XVII pp. 66-67.

were to be allowed only if unavoidable. Typical of the cases decided during the 1970's are the following:

| | *Range of Deviation*: |
|---|---|
| *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972) .. .. | 1.39% Senate<br>2.23% House |
| *Kelley* v. *Bumpers*, 340 F. Supp. 568 (E.D. Ark. W.D. 1972) .. | 3.5% Senate |
| *Beens* v. *Erdahl*, 336 F. Supp. 715 (4th Div., Minn. 1972), rev. on other grounds, sub nom., *Sixty-Seventh Minn. State Senate* v. *Beens*, — U.S. —, 32 L. Ed. 2d 1 (1972) .. .... | 2.53% Senate<br>3.94% House |
| *Ferrell* v. *Oklahoma*, 339 F. Supp. 73 (W.D. Okla. 1972) .. .. | 0.05% Senate |
| *Noun* v. *Turner*, 193 N.W. 2d 784 (Iowa, 1972) .. .. | 3.8% House<br>3.2% Senate |
| *Noun* v. *Turner*, 196 N.W. 2d 209 (Iowa, 1972) Final Plan .. | 1/11 of 1% House<br>1/20 of 1% Senate |
| *In the Matter of Schwartz* v. *Rockefeller*, — N.Y. 2d — (Ct. of Appeals, decided December 29, 1972 | 1.8% Senate<br>3.38% House |

The lower court decisions are similarly reflected in the range of deviations in reapportionment plans adopted throughout the country since 1971. The following chart indicates the range of deviation after 1970:[17]

[17] This chart is compiled from a pre-publication draft of a document prepared by Council of State Governments entitled "Reapportionment in the Seventies" to be published in January 1973. As of the date of preparation of this document the Council of State Governments had information as to 45 states with respect to the senate and 42 states with respect to the house, which had adopted reapportionment plans since 1970.

*Deviations after 1970*:

| *Range of Deviation*: | *Number of States*: | *Percentage of States*: |
|---|---|---|
| | ***Senate***: | |
| Under 1% | 3 | 6.7% |
| 1-5% | 21 | 46.7% |
| 5-10% | 8 | 17.8% |
| 10-15% | 5 | 11.1% |
| Over 15% | 8 | 17.8% |
| | ***House***: | |
| Under 1% | 4 | 9.5% |
| 1-5% | 16 | 38.1% |
| 5-10% | 8 | 19.1% |
| 10-15% | 4 | 9.5% |
| Over 15% | 10 | 23.8% |

Thus, while prior to 1970, only 2% of the states had a deviational range in the 1-5% bracket, after 1970, 53.4% of the states have achieved that deviational range for their senate and 47.6% for their house. Likewise, while prior to 1971, 88% of the states for the senate and 96% of the states for the house had deviational ranges of over 15%, after 1971, only 17% of the states for the senate and 23.8% of the states for the house have deviations in excess of 15%.

This is a dramatic result. It is the total answer to the pundits, including the Appellant in his brief, who have criticized this Court for an over-insistence upon equality.

Of little moment to this Court is that its critics have been proven wrong. Of great significance to this Court and to the nation is that the one man, one vote doctrine is achieving its purpose of guaranteeing to our citizens an equally weighted vote. This Court, by leading that movement, has fulfilled its most honored role of protecting and enhancing the basic civil rights of man.

After this extraordinary record of success, it is inconceivable that this Court would relax the standard of practicable equality and thereby stop or reverse the progress achieved.

An affirmance in this case will assure continuation of that progress.

## II. The District Court properly found as a matter of fact that political structuring caused deviations in the plan and properly held as a matter of law that political structuring is not an acceptable justification for population deviations.

### A. The requirement that deviations be justified.

Appellees submitted a reapportionment plan for the House with a range of deviation of 2.61%, compared with the Board Plan range of deviation of 7.83%. Appellees' plan was recognized as accurate and valid by the District Court.[18] Under such circumstances this Court, in *Swann* and in *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967) made it clear that the state has the duty to articulate acceptable reasons for variations among the population of the legislative districts in the challenged plan.

*Kirkpatrick* limited the state policies which might justify deviations and increased the duty of explanation by mandating that ". . . the State must justify each variance, no matter how small" (p. 531).

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[18] Court acceptance of the validity of Appellees' alternative plan is significant because it guards against the situation where the submission of any plan imposes a duty of explanation on the state. Appellant had the opportunity at the trial to challenge Appellees' plan. He chose not to do so and thereby conceded it to be accurate.

**B. The District Court properly found that political structuring caused the deviations in the plan.**

The Board did not simply refer to past election returns for the purpose of informing itself as to the possible political outcome of the Plan. Nor did it use this information as a corollary check on other factors. The Board pervasively applied prior election results and other political information to engineer and maneuver the district lines in order to achieve a desired political result. Political structuring was the dominant operating principle employed by the Board.[19]

Judge Saden, a member of the reapportionment Board, testified that he applied past election results in the creation of each and every district throughout the state.[20]

Likewise, Mr. Collins, his assistant and primary draftsman of the Plan, testified that political considerations were applied in the formation of assembly districts throughout the entire state.[21]

Judge Saden, in fact, went even further and testified that his understanding of the one man, one vote doctrine *re-*

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[19] Appellant characterizes the Board's shaping of districts for political ends as the application of a "political fairness principle". Such a pleasant sounding phrase is, of course, the classic trick of the advertising man. It not only hides reality; it endeavors by repeated assertion of the slogan, to substitute the slogan for reality. As will be shown, infra. pp. 51-54, the Board Plan was anything but "fair".

[20] Judge Saden testified: "Q. And did you in fact plug in the election results for all three years, '66, '68 and '70 into *each and every newly created senate district and house district?* (emphasis added) A. I did as far as you could . . ." Saden Dep., Single App. p. 67).

[21] Mr. Collins testified: "Q. So that political consideration then did go into the formation of Assembly Districts 18, 19 and 20? A. Absolutely. Absolutely. *Throughout the state this was true.*" Collins Dep., Single App. p. 101. (emphasis added).

*quired* that he adopt political structuring to carry out the true meaning of that doctrine.[22]

Respect for the preservation of towns played a minor role in the development of the Plan. Judge Parsky, another member of the reapportionment Board, testified that the operating principle of the Board was: "that once town lines were cut, from then on it didn't make any difference."[23]

Likewise, Mr. Vocelli, who worked for the Board, also testified that he had "the impression that once it became clear and obvious, there would be some violation of the state prohibition against town cuts, I got the impression that after that, concern about the integrity of the town lines diminished to virtually nothing" (Single App., p. 240).

Moreover, Plaintiffs' Exhibit 20 (Single App., p. 178) revealed that even at the Plan's deviational range, fewer town lines could be cut and cut a fewer number of times—i.e. 36 towns rather than 47 under the Plan and 49 segments of towns rather than 78 under the Plan.

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[22] Judge Saden testified: "'. . . if you concede as you must, the one-man, one-vote principle is one to create an equal protection of the law is a just result for every man's vote it seems to me that a corollary to that, as I explained to you before, is the proposition that if you don't get some kind—if you don't make any effort to get some kind of equal representation in the General Assembly in both Houses based upon the kind of total vote you are getting for those Houses you are thereby to that extent depriving the efficacy of that one-man, one-vote principle because you're denying minority groups as full a voice as they would otherwise be entitled to." (Saden Dep., Single App., p. 77)

[23] His exact testimony was: "Q. Was there a fundamental working principle, even if it hadn't been discussed, on the basis of how you dealt with the cutting of town lines in order to comply with the Federal constitutional requirements? A. Well, yes. The impression I had was that the operating principle was that once the town lines were cut, from then on it didn't make any difference" (Trial Transc., Single App., p. 187).

It is thus apparent that political structuring was the dominant policy consideration of the Board and played a major part in every one of its decisions with respect to the location of district lines.

Consequently, the District Court properly found as a fact that "the partisan political structuring . . . was a substantial cause of the numerical deviations of the Board Plan here[24] and that "If partisan political balancing were eliminated as a factor, a closer approach to perfect equality could be achieved with the materials at hand (see Plaintiffs' Ex. 23)."[25] The finding of the lower court, which heard the evidence, and was best able to weigh and evaluate it, should not be disturbed.[26]

**C. Political structuring is not an acceptable justification for the deviations.**

The District Court held that "political gerrymandering [as practiced by the Board] cannot be approved as a legitimate reason for violating the requirement of numerical equality of population in districts. . . . No legislative or constitutional enactment provides any basis for it or authorizes it. No compelling state necessity for it is demonstrated. The Supreme Court plainly would not approve the partisan political structuring which was a substantial cause of the numerical deviations of the Board plan here."[27]

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[24] Memo of Dec., op. cit. at p. 11a.

[25] Id. at p. 7a. Plaintiffs' Ex. 23 is the House Plan with a 2.16% deviation abstracted in the Single App. at p. 181.

[26] Since the trial court could properly have found, based on the evidence, that preservation of towns did not cause the Plan's deviations, Appellant's argument in his brief that political structuring did not cause the deviations avails him little. There would then be no explanation for them, and the Plan would be invalid under this Court's rule in *Swann* and *Kirkpatrick* that justification for the deviation was required.

[27] Memo of Dec., op. cit. pp. 10a, 11a.

In so holding the lower court was following this Court's precise ruling in *Kirkpatrick*, and its necessary implication in *Ely* v. *Klahr*, 403 U.S. 108 (1971).

**1. Bi-partisan cooperation and the necessity for political compromise do not excuse unequal districts.**

The political party interplay inherent in the political structuring employed by the Board is similar to the "legislative interplay" and "reasonable legislative compromise" the appellants in *Kirkpatrick* argued should justify the deviations in that case. The *Kirkpatrick* appellants further urged this Court to remember that "practical political problems" are inherent in the enactment of reapportionment plans.

However, this Court denied that they were justifications for avoidable deviations. Justice Brennan agreed with the lower court that the rule was one of "practicality" rather than "political practicality", and went on to answer the question now before us by stating: "Problems created by *partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.*" (*Kirkpatrick*, p. 533, emphasis added).

Likewise in *Paulson v. Meier*, 246 F. Supp. 36 (D.N.D., 1965), one of the grounds the district court used to reject a plan was that there appeared to be no rational design to justify the disparities other than to secure passage of the reapportionment act.

Appellant here claims that political structuring justified the deviations because the Board's purpose was to prevent partisan political gerrymandering. In a like vein, the *Kirkpatrick* appellants sought to excuse deviations on the ground that the preservation of county lines was a means of minimizing the opportunities of partisan gerrymandering. This Court responded: "But an argument that deviations from equality are justified in order to inhibit legislators from en-

gaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparties" (*Kirkpatrick*, p. 534).

*Ely* v. *Klahr*, supra, presented the situation of political parties in Arizona devising legislative districts by the use of computers that took into account, among other factors, each party's political strength in geographic areas of the state. The lower court had held: "In addition, we disapprove as *inapposite* the consideration of party strength as a factor in reapportionment or redistricting" (*Klahr* v. *Williams*, 313 F. Supp. 48, 152 (D. Ariz. 1970) (emphasis added). This Court, in affirming, noted with approval the lower court finding that party strength was "inapposite"—i.e. that it was irrelevant and inappropriate in the creation of a plan.

In *Noun* v. *Turner*, 193 N.W. 2d 784 (Iowa 1972), the Iowa Supreme Court rejected a plan consciously designed to achieve a predetermined political result similar to the political balancing objective of the Plan before this Court.

What all these cases are saying is that the courts recognize that reapportionment is carried out in a political atmosphere and that every plan has political implications. However, the political factors should not be allowed "to predominate over the requirements of practicable equality" *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C, 1966) aff'd, 383 U.S. 831 (1966).[28]

The underlying policy consideration for rejecting political structuring as a justification for population deviation is that it is too easy "an escape hatch for the reluctant" *Preisler* v. *Sec. of State of Missouri*, 257 F. Supp. 953, 970

[28] Judge Caleb N. Wright, dissenting in *Sincock* v. *Gately*, 262 F. Supp. 739, 858 (D. Del. 1967) said "To concentrate on the political affiliations of the citizenry in drafting a scheme of reapportionment is to employ an impermissable standard."

(W.D. Mo., Cent. Div. 1966) and too open "an avenue of subterfuge" (*Kirkpatrick* at p. 535). The political factors always being present in the reapportionment process, they can always be paraded out to excuse any deviation. To allow these political factors to be a justification for population deviation in a plan would destroy the one-man, one-vote doctrine.

Appellant argues that because the political structuring employed by the Board was bi-partisan, it should be more acceptable to this Court. As will be shown below, (*infra*, pp. 51-54) the Board did not operate, in fact, in a bi-partisan manner. But assuming *arguendo*, it did, bi-partisanship alone does not justify the deviations flowing from political structuring.

Both political parties united in creating the plans which were rejected by this Court in *Ely* v. *Klahr, supra,* and by the Iowa Supreme Court in *Noun* v. *Turner, supra.* Joint cooperative efforts by the political parties do not excuse unequal districts. The individual voter denied an equally weighted vote is no better off because of the number of political parties who participated in depriving him of his constitutional right, even if one of those political parties were his own.

The Appellant also argues that Article Third, Section 6 of the Connecticut State Constitution, which establishes a procedure for reapportionment requiring the concensus of both political parties, authorizes, and even necessitates, the Board's policy of endeavoring to proportionalize political party representation. The argument is ingenuous but specious. There is no logical link between the mechanical and institutional process of reapportionment, and the policies and principles that a reapportionment body must follow to do its job. Surely, the argument could not be turned around, and, if the Board had not utilized the proportional representation method it did, appellees could argue before a state court that the Board had violated Article Third, Section 6 of the State Constitution.

Moreover, the intent of the State Constitution is more accurately discernible by its words than by general analogy. Article Third, Sections 3 and 4 provide for single member senate and assembly districts. The proportional representation principle adopted by the Board, flies in the face of these specific provisions of the Connecticut Constitution. The system of single member representation is subverted when a legislative districting plan is designed to elect legislators on the basis of a state-wide formula reflecting the total state-wide vote of each political party.[29]

**2. "Fair" representation, not being susceptible of definable standards or of objective testing, should not be allowed as an excuse for inequality.**

Appellant argues that political structuring employed by the Board is entitled to special preference because the avowed purpose was to achieve "fair" representation by both the political parties.

There are a number of reasons why this claim should be rejected:

(a) There is no way to test before an election whether or not the Board lived up to its assertion of fairness. In the political gerrymandering cases, the courts have indicated that it is pure speculation to guess at the outcome of a future election, and it is "unrealistic" to project the results of past elections because they are only an indication of voters' reaction to a particular candidate at that time (*Wells* v.

[29] It is worth observing that proportional representation has never been used for the election of a state legislature in the country. Although it was used in the election of city councils in 22 cities between 1915 and 1948, after it was rejected in New York City in 1947, it was repealed throughout the country, except in Cambridge, Mass. Silva, *Relation of Representation and Party System to the Number of Seats Appertaining to a Legislative District*. 17 West. Pol. Q. 742 at p. 759 (1964).

*Rockefeller*, 311 F. Supp. 48, 51 (S.D.N.Y. 1970).[30] Requiring that citizens be subjected to an election under a plan before they can challenge whether or not it is unconstitutional, is itself unfair.

(b) If "fairness" can be tested by an election, then based upon the 1972 election in which the Plan was used, it was unfair. It revealed a significant bias in favor of the Republican Party.

In the 1972 Connecticut senate races, the Republicans received a state-wide total of 724,471 votes or 54.18% of the vote and elected 63.88% of the senators (23 out of 36). Democrats in the senate polled 611,186 votes, or 45.71% of the vote and elected 36.12% (13 out of 36). In the races for the Connecticut House of Representatives, the Republicans polled 705,878 votes or 52.88% of the vote and elected 61.59% of the members of the lower house (93 out of 151). The Democrats polled 625,499 votes or 46.86% of the vote and elected 38.41% of the representatives (58 out of 151).[31]

These results are to be compared with the results of the 1970 election under the pre-Board Plan. For the House, the results are somewhat muddied by the fact that a number of candidates ran unopposed. However, as to the Senate, the Democratic candidates in 1970 polled 518,726 votes, and the Republican candidates 536,555 votes. The Democrats elected 19 senators and the Republicans, 17. The Democrats thus got 49.15% of the vote and elected 52.77% of the senators. The disparity between the proportion of party state-wide vote and proportion of party candidates elected under the politically unstructured pre-Board Plan

[30] Speculation as to election results is particularly unreliable when district lines are changed and there is no track record for the new districts.

[31] *Statement of Vote*, General Election, November 7, 1972, published by the State of Connecticut.

was 3.6%. Under the so-called "fair" Board Plan, it is 9.0%.[32]

(c) If one election is not an accurate test of the "fairness" of the Plan, then how many elections are required? Obviously there are only five elections for the legislature in each decade. If the Plan must be tested by several, since reapportionment cases take almost a year to be tried and appealed, then the deviations caused by political structuring, for all practical purposes, would be immune from justification, and a plan which is the product of political structuring could regularly win by default.

(d) Fairness not only cannot be tested, it cannot even be defined. What is the requisite proximity between the percentage of the party's total state-wide vote and the percentage of the number of candidates it elects? If a party gets 52% of the vote, is it fair if it elects 50% of its candidates?—40% of its candidates?—35% of its candidates? The Court is pushed into a numbers game without any rules at all.

(e) From the foregoing, it is apparent political fairness has no standard by which to measure it and offers no objective way to test it.[33] The Court is thus left with nothing more than the word of the reapportioning authorities, or of their proponents, that their plan is "fair". Viewed in this light, the claim of "political fairness" as an excuse for fail-

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[32] This result not only indicates that the Plan was unfair, but it reveals that the Board never had the objective of seeking fairness at all and that the Plan was deliberately designed to create a bias in favor of the Republican Party. Significantly, 1972 registration figures reveal that registered Democrats in Connecticut outnumber registered Republicans by 135,000. Consequently, any deliberate attempt at juggling district lines was obviously aimed at obliterating this registration plurality by maximizing Republican votes in given districts.

[33] Professor Irwin has noted: "It would be hard to imagine an adjective more imprecise and political in nature than 'fair'." Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 Mich. L.R. 729, 752 (1969).

ing to achieve equality is essentialy no different than the excuse of "practical politics". Both of them are simply too wide an avenue for subterfuge, and if allowed as the justification for population deviations in a reapportionment plan, would impose no restraints on those deviations.

**3. Focusing upon representation as a division of power in the legislature between the political parties leads the Court into political questions which are judicially unmanageable.**

Trying to achieve fair representation of the political parties in one-man, one-vote cases, is like trying to assure funds for secular education in the public aid to parochial school cases. The very attempt "entangles" [34] the Court in religious affairs in one group of cases and in political affairs in the other. Both are issues this Court has sought to avoid.

Representation involves the matter of the division of political power between the political parties in the legislature resulting from an election. Professor Irwin has wisely said: "Representation is the substance of the political process. It *is* the political thicket." [35] The thorny issues it raises meets one of the criteria of a "political question"—that is, a "lack of judicially discoverable and manageable standards" *Baker* v. *Carr*, 269, U.S. 189, 217 (1962). There is still vitality in the policy of the Court's restraining itself from dealing with such questions.

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[34] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Appellants misinterprets the Court's use of the phrase "effective representation" in *Reynolds*. As used in that case the quality of representation clearly related to an especially weighted vote. It certainly did not relate to proportionalization of political party strength.

[35] Irwin, op. cit., 67 Mich. L.R. 729, 748 (1969). This article contains an excellent discussion of the distinction between the constitutional questions raised by issues of the equally weighted vote and representation. It points out the dangers of the courts' trying to resolve problems associated with representation.

This Court has succeeded in one-man, one-vote cases because it has decided only the objective constitutional issues of equal suffrage. If it allows a political fairness principle to justify deviations from equality, it will both lose itself in the political morass and lose the success it has gained.

**III. Political structuring is founded upon an irrational premise and has irrational and pernicious consequences which not only disqualify it as a justification for the deviations in the plan but also its pervasive use causes invalidation of the plan itself.**

The alleged aim of the political structuring principle used by the Board was to proportionalize each party's strength in the legislature on the basis of the total state-wide vote received by all of each party's candidates in the district elections. The presumption is that the state-wide total of the votes for all of a party's candidates running in individual districts has some meaning. In fact, that total has no meaning at all.

Whereas, a state-wide candidate runs as a party candidate in all the districts and wins on the basis of the state-wide vote, legislators run as party candidates only in each individual district and win on the basis of the vote in each district. The races in each of these individual districts are disparate.[36] Party affiliations in district elections are of small significance and, if we are to believe the political scientists, they are becoming less important. District elections are more likely determined by the different personalities and the varying personal popularity of the individual candidates, by the factor of incumbency, by campaign organization and finances and by completely local issues such as the prospect of low-income housing being brought into a town; sex education in the schools; or a local tax problem. Adding up votes cast for all of each party's candidates in

[36] An illustration on the national scale is the recent landslide victory of President Nixon when compared with his party's inability to win a majority in local congressional races.

these different district races is like adding up apples, hockey sticks and yellow cadillacs. That state-wide total is not a rational number.

Using that irrational number as a basis for proportionalizing parties' strength, renders the Board's political balancing principle an irrational standard.

The use of an arbitrary, capricious or irrational standard as a basis for classification or making distinctions between citizens is itself a violation of the Equal Protection Clause.[37]

Since the political balance principle is itself irrational, its pervasive use in the development of the Plan inevitably had irrational results. Among them were bizarrely shaped districts, unnecessary fragmenting of town lines and arbitrarily created safe districts.

In addition, the whole attempt to structure districts to achieve particular political ends rendered the Plan a gigantic gerrymander. If this Court validates the Board's methods, it will have the consequences of sanctifying a mutilation of legislative districts in other states and of authorizing other more effective methods for manipulating the outcome of elections.

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[37] This Court said in *Avery* v. *Midland County, Texas*, 390 U.S. 474 (1968) at 484: "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.' In *Burns* v. *Swenson*, 430 F.2d 771, 778 (8th Cir., 1970) which involved a claim of denial of equal protection when a recalcitrant prisoner was placed in maximum security, the 8th Circuit Court said the essential element to an equal protection challenge is: "The alleged invidious discrimination must be against one person in favor of another *person* or *class of persons* with *no rational basis* of differentiation in treatment (emphasis added). See also, *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969) and *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

These results and consequences clearly disqualify political structuring as a justification for the deviations in the Plan. Their total impact so perverts the salutary purpose of equality implicit in the one man, one vote doctrine and makes such a mockery of the franchise as to warrant invalidating the Plan itself.

**A. The peculiarly shaped districts as an evidence of irrationality.**

The District Court found that the political structuring "method used resulted in creating some districts with highly irregular and bizarre outlines" (Memo. of Dec., op. cit. p. 7a). Since the lower court is familiar with the local political terrain, its finding on this issue is entitled to great weight.

Inevitably when the excess plurality of a party in one area of the state becomes a justification for maneuvering to elect that party's candidates in another area of the state, the district lines must wiggle and joggle to ferret out pockets of that party's strength. Judge Saden freely admitted this is precisely what happened in the development of the Board plan. He testified at the trial as follows:

> "Q. (By Judge Blumenfeld) In applying this corollary to the doctrine of fairness, is that what caused some of these districts to come out in what have been described as unusual shapes or shapes that deviate from normal? A. In some instances, that may have occurred" (Single App., p. 265).

Even legislative districts which were compact, rational and within town lines were required to be fragmented by the inexorable operation of the principle. Judge Saden himself conceded as much when he said each individual district could not be considered piecemeal no matter how fair it may

be by itself but must be considered only in the context of how it fitted into the overall political balance principle.[38]

Political structuring accounted for the strained contiguity in the ninth senatorial district of the Towns of Farmington and Newington which were connected by an empty swamp, 1,000 feet in length (See Appellees' Ex. 24 A-E and 25 A-E). It also caused[39] the grotesque, almost Rorschach shapes of many of the districts demonstrated in Appellees' Exhibit 19 (Single App. pp. 153-177). Appellees introduced exhibits which proved that by following town and census tract boundaries and disregarding political objectives, much more rational designs for many of these districts could be achieved.[40]

Bizarrely shaped and geographically peculiar districts are easy to spot and hard to justify. Indeed, recognizing grotesque and bizarre voting districts is similar to the pragmatic recognition of hard-core pornography enunciated by Justice Stewart in *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964): ". . . perhaps I could never succeed in intelligibly

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[38] Judge Saden testified as follows: "Q. In deciding to add a portion of another town or a segment of another town did you in each case look to the election results for those contiguous towns to determine which segment you were going to add? A. I gave consideration to that factor as a factor in testing the whole area and in trying to reach an overall fair plan. *I mean, you can't just take these things piecemeal* and say, 'Well, forget everything else and *just take this one little district here and is that a good fair district the way it is drawn?*' . . ." (Single App. p. 218-224) (emphasis added).

[39] Mr. Collins testified: "Q. Well, does not, however, Plaintiff's Exhibit E1 illustrate that census data alone was not the cause for all of the turns and twists that appear in the board plan? A. I never said that it was. Q. It was the political consideration? A. Absolutely. Absolutely. I don't think anybody is denying this or should. (Single App. p. 100)

[40] See Appellees' Exhibits 9 through 18 on file with the clerk which are not printed in the appendix under Rule 38 of this Court. See also the testimony of Mr. Vocelli, Single App. pp. 212-226.

[defining it]. But I know it when I see it. . . ." Even a cursory examination of the House and Senate Districts contained in the Appellees' Exhibit 19 (Single Appendix, pp. 152-177) quickly reveals the lengths to which the Board went in imaginative gerrymandering.

Individual citizens residing in the mutilated districts are sacrificed to the over-all objective of political balance. They become like Rosencrantz and Guildenstern in *Hamlet*, innocent victims of the machinations of those in power.

The District Court below held that these peculiar shapes were indications that "impermissable purposes rather than compelling state interest had caused deviations from equality".[41]

The irrationality of the districts can also justify invalidating the Plan itself.

In *Reynolds* at Page 567, this Court described the districts in that case as "little more than crazy quilts, completely lacking in rationality and could be found invalid on that basis alone."

In *Drum* v. *Seawell*, 250 F. Supp. 922, 925 (M.D. N.C. 1966) aff'd 383 U.S. 831 (1966), the district court held that "compactness and contiguity are aspects of practicable equality" and that the "tortuous lines which delineate the district boundaries" and the "resulting lack of compactness and contiguity" were grounds for declaring the plan constitutionally invalid.

Judge Canella, dissenting in *Wells* v. *Rockefeller*, 311 F. Supp. 48 57 (S.D. N.Y. 1970) relied upon this Court's reference to "crazy quilts" in the *Reynolds* case to state that "wild district configurations are not constitutionally acceptable".

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[41] Memo of Dec., op. cit., p. 7a.

In *Paulson* v. *Meier* 246 F. Supp. 36 (D.N.D. 1965) the Court took great pains to describe a particularly oddly shaped district in order to demonstrate the lack of rationality as a ground for condemning the Plan.

While recognizing that this Court has never thrown out a plan on the basis of lack of compactness of the districts, nevertheless, Appellees urge that this is an appropriate case to so hold when the irrationally shaped districts are the consequence of the pervasive application of an irrational standard in the development of the Plan.

**B. Irrational fragmenting of towns.**

The lower court found that "If partisan political balancing were eliminated as a factor . . . fewer towns could be cut" (Memo. of Dec., id, p. 7a).

The evidence in this case is clear that the towns were fragmented not to achieve a closer approximation to equality but to effectuate the Plan's political structuring principle.

Both Judge Saden and Mr. Collins testified that when there was a choice in the development of assembly districts between preserving town lines and achieving their notion of political balance, they always chose the second objective.[42] In fact, Judge Saden specifically stated: ". . . It is far more important to have a fair plan than to preserve a town line . . ." (Single App. p. 47) and "where there are other considerations of fairness . . . I did not insist town lines be maintained exact" (Single App. p. 56).

As illustrative of the Board's practice of unnecessarily or excessively dividing towns solely for political reasons, appellees adduced evidence of specific examples of cutting the Towns of Killingly, Watertown, Montville, Hamden and

[42] See Collins Dep., Single App. p. 96; Saden Dep., Single App. pp. 47, 53.

North Haven.[43] Further, specific examples were unnecessary when the authors of the Plan readily conceded political structuring caused and justified the town cuts.

Plaintiffs' Exhibit 20 (Single App. p. 178) proved that by keeping within the Plan's deviational limits, only 36 (as opposed to the Plan's 47) towns had to be cut, and only 49 (as opposed to the Plan's 78) segments had to be created. This was a significant preservation of town structure.

Dividing towns in order to achieve population equality is constitutionally necessary. However, fragmenting towns for any other reason is irrational. The individual citizen expects that legislative districts will follow town lines and attaches an appropriateness to such congruency. To him, the unnecessary splintering of towns in the formation of districts is clearer evidence of the Plan's arbitrariness than the peculiarly shaped districts. On the basis of either evidence of irrationality, the Plan should be invalidated.[44]

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[43] See Appellees' Exhibits 5, 5-A, 6, 6-A, 7, 7-A and Collins and Saden Depositions in Single App. at pp. 42-56 and 96-98.

[44] The Connecticut Supreme Court in *Miller* v. *Schaffer* (Reported in the Connecticut Law Journal, Vol. XXXIV, No. 23, December 5, 1972) at Page 1) held that the Plan was valid for interim use for the November, 1972 election. Although that court indicated that town lines were not cut in violation of the State Constitution, it is significant that the court never mentioned the Board's political structuring policy. The entire record of the federal case appealed to this Court, including all the exhibits, depositions, and trial transcript, was entered as an exhibit in the state case and constituted over 90% of the record of the state case. The state court was asked by the same attorneys who represent the Appellant in this case to refrain from deciding any federal question. Obviously, it considered that political structuring raised a federal issue which it deliberately refrained from deciding. As a result, the assertion here made that political structuring caused the irrational fragmenting of town lines and violated the standard of practicable equality referred to in *Drum* v. *Seawell, supra,* was not decided or considered by the state court.

**C. The arbitrary creation of safe districts.**

For the political structuring principle to work and in order to achieve the intended relationship between the total party vote and assured election of the requisite number of the candidates of each party, the legislative districts must be made as safe as possible.

The evidence in this case establishes that creating safe districts was an objective of the Board.

Swing senatorial districts were changed into safe districts. Mrs. Osborn testified at the trial that Senatorial District 18 prior to the Plan had been a swing district in which, in the three elections of 1966, 1968 and 1970, the margin of victory had been a few hundred votes out of a population of over 85,000. However, by the Plan deliberately removing the Democratic Town of Griswold and adding a Republican portion of Norwich, the senatorial district became solidly Republican (Single App. pp. 257-260) and in fact, in the 1972 election, this district went Republican by 8,200 votes.[45]

The creation of safe districts sacrifices the individual voter to political party objectives. The lower court properly recognized this consequence when it stated:

> "It is arguably unfair to individual voters and potential candidates for political office to find themselves locked into districts deliberately structured to be 'safe districts' for a party they oppose."

Safe districts moreover create the kind of "fiefdom" decried by Justices Douglas and Black in *Ely* v. *Klahr*, supra at p. 118.

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[45] See *Statement of Vote, General Election*, November 7, 1972, published by the State of Connecticut.

It is no answer, as Appellant claims, that safe districts often result from residential patterns. Natural political groupings may occur as a result of people moving on their own volition into district of known political predilictions. It is quite another thing to superimpose artifically and arbitrarily a predetermined political grid work over these natural groupings in order to achieve a politically structured result on a statewide basis.

**D. The plan as a gigantic gerrymander.**

The one fact that smashes one in the face about this case is that the Plan is a politically saturated document. Every district line has been dictated by a desire to achieve the prescribed political purpose—a proportionalization of the strength of each political party.

Normally, proof of political purpose in reapportionment cases is hard to come by. Here, it is not only offered but it is shouted. It is even proclaimed as the crowning virtue of the Plan. Normally, gerrymandering is confined to a few districts in a reapportionment scheme. Here, the political structuring contaminates every district in the entire state.

Appellees contend that the Plan has a built-in bias in favor of the Republican Party, and the use of the Plan in the 1972 election proved it. But whether or not that election is sufficient proof, the Board's practice of maneuvering district lines for political purposes meets the definition of gerrymandering.[46]

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[46] Justice Fortas in *Kirkpatrick* (p. 538), defined gerrymandering as "the deliberate and arbitrary distortion of district lines and population for partisan or personal political purposes". See also Edwards, *The Gerrymander and 'One-Man, One-Vote'* '46 N.Y.U. Law Rev. 779, Nov. 1971.

The political structuring here applied overrode every consideration which traditionally characterizes a sound reapportionment plan: equality in population of the districts, rational shapes of the districts and preservation of town boundaries. Nothing was safe before the inexorable application of the Board's fanatical principle.

Judge Saden tells us that the Plan was intended to be "fair" and Appellant dins it in our ears. But we cannot define fairness or test it, and we do not know whether or not we received it. All we are sure we have is the sound of the advertising man's slogans, and experience tells us that these slogans are inaccurate descriptions of reality.

The Board's political structuring method of proportionalizing political parties' strength on the basis of state-wide vote in the district elections is a dangerous national precedent if allowed in states where there is a non-congruency between a political party's strength and the population spread.[47] Consider a state with one large city in which the Democratic Party candidates win elections by large pluralities (Colorado with Denver; Minnesota with Minneapolis-St. Paul; Missouri with Kansas City, come readily to mind). If, in order to keep the proper proportion between total state-wide party vote and party candidates elected, these large city pluralities must be utilized to elect Democratic candidates in other areas of the states, the opportunity, even the necessity, for mutilation of district lines is boundless.

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[47] This accounts for the peculiarly shaped districts in the Plan. In Connecticut, Fairfield County comprises about 13% of the land area (611 square miles out of 5009) and in 1970, it produced about 30% of the Republicans total state-wide vote in the House district races. (Land area statistics derived from *Connecticut State Register & Manual*, 1971 and election statistics derived from *Statement of Vote* 1970, published by the State of Connecticut).

This Court's approval of the blatant political structuring characterizing this Plan will encourage, even sanctify, gerrymandering of the nature we have just described throughout the country.

Viewed from the point of view of the individual citizen, whose individual and personal rights the one-man, one-vote doctrine is designed to protect, there is an intuitive resentment at allowing reapportionment authorities to design legislative districts so as to predetermine the outcome of elections. It strikes him as a perversion of the salutary purpose of the reapportionment process under which he is supposed to be given an equally weighted vote.

Concededly, the people are volatile. But the right in the reapportionment authorities to make the attempt at predetermination of elections is disturbing. Up to now, they may have failed because their techniques have been clumsy, and they have not hit upon the correct formula.

However, a tremendous amount of sampling of public opinion goes on all the time. It is done not only by advertisers but also by firms specializing in political predictions. The results of all this polling are classified, quantified, qualified and analyzed through and by computers. They are used to develop group profiles. If, as a consequence of all of this work, a scientifically arrived at standard is discovered which does accurately identify the salient common characteristic of definable groups, then consider the consequences of the use of that standard as the governing principle in reapportionment. The results of elections would then be truly predictable. A mockery would be made of the franchise. Connecticut citizens would go to the polls like the Russians and the Chinese—to evince a civic virtue but not to determine the outcome.

The Equal Protection Clause requires that districts be as equal in population as practicable so that one man's vote has no more numerical weight than another's. This was an important advance.

But it is not enough that a vote be equal. It is more important that the vote matter.

To paraphrase the last lament of Faust: "What doeth it profit a voter to gain the right to equality and lose the right of determination."

In Connecticut, as a result of the Board's political structuring, the voters gain neither and lose both.

Where voters are grouped and classified and made pawns of political parties in order to achieve a purpose unrelated to the essential requirements of the one-man, one-vote doctrine, then they have been invidiously discriminated against. They are thus denied their "individual and personal" right to a real vote under the Equal Protection Clause (*Reynolds* at 562).

The Board's extensive gerrymandering cannot be a justification for the Plan's deviations. It should be a justification for the Plan's invalidation.

**IV. The plan, failing to meet constitutional requirements, cannot be raised to constitutional validity by the form of the reapportionment Board which created it.**

The Appellant argues that the Connecticut Apportionment Board should be cloaked with such constitutional legitimacy that any document produced by it carries a presumption of rectitude. His focus is on *who* created the Plan of Districting, rather than on *what* they created.

The evidence in this case reveals that partisan political consideration dominated the decision-making of the Reapportionment Board which created the Plan.

Tested by the 1972 election results and using the very measure of political balance asserted by Judge Saden, the Plan was not "fair". Republicans received 54.18% of the

state-wide senate vote and elected 63.88% of the senators; received 52.88% of the state-wide house vote and elected 61.59% of the representatives. Such a disparity raises a serious question of whether the majority of the Board ever intended to be "fair".

However, the issue here is not whether or not one political party gained an advantage over the other. The Appellees in this case are citizens and voters who assert their individual and personal rights under the Equal Protection Clause.

Whatever the composition of the Board, when it failed to meet the required standard of equality among the legislative districts and failed to justify the deviations by a rational state policy, the Plan it created violates the Fourteenth Amendment.

Moreover, the way the Board functioned in this case deprives it of any presumption of fairness. What is abundantly clear from the evidence is that the Plan of Districting that is the subject matter of this action is in reality the handiwork of two men—Judge George Saden and his counsel, James Collins. Judge Saden had served as counsel to the minority leadership in the Connecticut General Assembly from the date it convened on January 6, 1971 (Saden dep. Single App. p. 20). In this capacity, he toiled for some five months, advising the minority members of the General Assembly and the eight-man Reapportionment Commission which attempted to meet the constitutional mandate of reapportionment. In June of 1971, Judge Saden was appointed to the Connecticut Superior Court by the Governor of Connecticut, which appointment was confirmed by the General Assembly on June 3, 1971.[48] He took office on or about

[48] *Journal of the Connecticut House of Representatives*, 1971 Session, June 3, 1971.

June 15, 1971, and within two weeks, he was named to the Reapportionment Board to begin work on deciding on a plan of apportionment for which he had been an actively partisan advocate for five months. In a sense, he found himself in the enviable position of advocating a case for five months as counsel and then being able to decide as a judge the very case he had been arguing.

Judge Saden was substantially aided by Mr. James Collins, who was his chief assistant, mathematician and draftsman (Single App. pp. 29-31). Mr. Collins, like Judge Saden, had served as special counsel to the Republican members of the eight-man Reapportionment Commission and from April 1, 1971 through July 1, 1971, had taken an active partisan role in the reapportionment process. Mr. Collins prepared the drafts of the plans which were submitted by Judge Saden (Single App. p. 31).

The State Constitution required the Board to submit a reapportionment plan by September 30, 1971. The Board first met on August 24 or 25, 1971, hardly a month before the deadline (Single App., pp. 22, 86). Judge Saden and Judge Parskey operated essentially independently of one another in the preparation of a plan and then tried to agree between themselves (Single App., p. 23). Justice Thim was supposed to act as an arbitrator to resolve the difference when the two judges could not agree (Single App., p. 23).

Judge Saden and Judge Parskey agreed as a matter of priority to deal first with the districting of the Senate. They spent the period from August 25 to September 24 primarily on this task (Single App., pp. 23, 25). They met on September 24, now only six days before the deadline. A vote was taken on the Senate plan. After the vote, Judge Parskey left the meeting (Single App., p. 26) and thereafter, there was never another meeting of the Board as a board (Single App., p. 27).

The Board never met over a districting plan for the House. After Judge Parskey left the meeting of September 24, Judge Saden testified "We never got a chance to sit down and go over the House plan from that point on" (Single App., p. 26). The only plan of districting of the House that Justice Thim had presented to him was Judge Saden's, so he had no other choice but to accept that plan (Single App., p. 107).[49]

The Board never met to approve the final district lines for both the House and the Senate as a single plan. The Plan was prepared in its final form, signed by Judge Saden, and then it was taken to Justice Thim at his home for his signature on September 30, 1971 (Single App., p. 27). Judge Parskey declined to approve the Plan but instead filed a dissenting report.

Thus, it is apparent that the document ultimately approved by the majority of the Board was the work of Judge Saden, assisted by Mr. Collins, both of whom for the six months prior to their service on the Board had been actively engaged in the partisan efforts of the Connecticut General Assembly to negotiate a plan of reapportionment. The Appellant would now ask this Court to sanction the highly partisan character of the architects of the plan and to bless their work with some sort of constitutional solemnity simply because the *form* that was followed was cast with statesmanship.

However, the foregoing indicates that one cannot simply look to the form of the Reapportionment Board and come to

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[49] Mr. Collins testified:

"Well, the plan as submitted was accepted by Judge Thim, but if I remember correctly, I think this was the only plan on the House that was submitted to Judge Thim. There was no other plan on the House submitted to him, so the man in fact didn't have any choice, I suppose."

any conclusion that it is entitled to some special favoritism. In actual operation, this Board was neither deliberative nor nonpartisan. Therefore, it is not entitled to any presumption of fairness. Its work product must be scrutinized as carefully as any other plan of apportionment to come before this Court, and the criteria for determining its constitutionality must be the same.

If this Court takes its primary focus off the rights of citizens and voters and begins to ascribe some constitutional sanctity to the claimed "rights" of political parties, as sought herein, then the reapportionment process will itself become the exclusive province of those parties as well. It is inconceivable that this Court would legitimize a political process by giving its work product a presumption of constitutionality at the expense of the explicitly guaranteed rights of citizens and voters as individuals.

**V. If this Court allows deviations higher than the lowest practicable to achieve, then the proper interpretation of the Supremacy Clause would permit a state constitutional policy of preserving town lines to justify a higher deviation among the House Districts than provided in the Board Plan.**

If this Court construes the Fourteenth Amendment to permit deviations from equality higher than those permitted by the District Court and higher than the lowest that is practicable to achieve, then the state plan is still unconstitutional because, contrary to the Supremacy Clause, it applies an unnecessarily restrictive Fourteenth Amendment standard at the expense of a valid state policy of preserving town lines.

The District Court properly read the leading decisions of this Court (*Reynolds*, *Swann* and *Kirkpatrick*), to mean what they appear to say: namely, that the Equal Protections Clause requires that population of legislative districts must be "as nearly equal as is practicable". The Court found that

the requisite standard of "as equal as practicable" had not been met, and the availability of a plan with a lower deviation irrefutably supports this finding. It further found that the political structuring principle was a substantial cause of the deviation and that this principle was not a proper state policy to justify the deviation.

Appellant claims that the District Court is unnecessarily restrictive and that deviations higher than those mathematically necessary should be allowed.

If this Court is going to reinterpret its prior decisions to permit deviations which are higher than can be practicably achieved, then the Appellees contend the Board plan is still unconstitutional because it violates the Supremacy Clause. In essence, we contend that if the Fourteenth Amendment does not require as small a deviation as is practicable, then a plan prepared under whatever greater latitude this Court might now be prepared to permit, must, within reasonable limits, accommodate state interests such as the integrity of town lines. For example, if this Court were now to permit a range of deviations of up to 15%, the Court would be interpreting the Fourteenth Amendment not to require any smaller deviation. Under the Supremacy Clause, state interests—certainly those set forth in a state's constitution—must not be impaired to any extent greater than required by federal law. Thus, if this Court were now to accord states more latitude, then it must also accord an opportunity for the development of a plan that preserves valid state interests (here, town lines) to as great an extent as federal requirements permit. It would be a coincidence defying belief if the deviation of the Board's Plan was precisely the limit this Court is now prepared to say the Fourteenth Amendment permits. But even if this were so, the evidence shows that the Board Plan cuts more towns than need to be cut even at the same deviation (Single App., p. 178). If any larger deviation is permitted as a matter of federal constitutional law, then any state plan that cuts

town lines more than is necessarily required by the federal standard violates the Supremacy Clause.

Appellees' position is not inconsistent, as the Appellant's brief alleges. Appellees are not saying that the deviations, as mathematical expressions, are simultaneously both too high and too low under the existing standard. Appellees are saying that if the deviations must be as small as practicable, in the absence of a valid state policy justifying same (and political structuring is not a valid state policy), the deviations in the Board Plan are too high. But under any new and less exacting standard of deviation enunciated in this case by this Court and in the presence of a valid state policy (such as the preservation of town lines), the deviations in the Board Plan are too low.

If this Court recognizes respect for town lines as a legitimate reason for higher than mathematically necessary deviations, then the effectuation of this state policy justifies deviations higher than the Board Plan.

Appellees submitted to the Court a plan for the House with a range of deviation of 11.5% (compared with the Plan's 7.8%) which resulted in the division of 31 towns as compared to the Plan's 47 towns and creating 39 segments, as compared to the Plan's 78 segments (Plaintiff's Ex. 21, Single App., p. 179). Appellees also submitted to the Court a plan for the apportionment of the House with a range of deviation of 15% (compared with the Plan's 7.8%) which resulted in the division of 27 towns as compared to the Plan's 47 towns and created 34 segments as compared to the Plan's 78 segments (Plaintiff's Ex. 22, Single App., p. 180). The latter plan represents almost a 50% reduction in the fragmenting of towns at a relatively slight increase in percentage deviation.

This Court has recognized that variations in permissible deviations in order to effectuate particular state policy may depend "on the particular circumstances of the case" (*Reynolds* at p. 578; *Swann* at p. 445). In Connecticut,

towns perform very important state functions (Single App., pp. 135-137, Plaintiff's Exhibit 2; Single App., pp. 195-197). Towns also are the geographic base for political organizations of citizens.

Allowing more flexibility in the interpretation of the Fourteenth Amendment in order to give greater weight to the State Constitutional prohibition against dividing town lines is the proper way to apply the Supremacy Clause of the United States Constitution. Whenever possible, accommodation should be achieved and conflict minimized in the interpretation of the provisions of both the federal and a state constitution. *Reynolds* at p. 584; see also *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926); *Joseph E. Segram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Potlatch Forests, Inc. v. Hays*, 318 F. Supp. 1368 at 1371 (E.D. Ark. W.D. 1970).

## CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the District Court for the District of Connecticut here appealed from.

If this Court reinterprets its prior decisions to permit deviations which are higher than strict mathematical equality, then this case should be remanded to the District Court with direction to apply the new rules to the facts of this case.

Respectfully submitted,

ROBERT A. SATTER
60 Washington Street
Hartford, Connecticut

JAMES A. WADE
799 Main Street
Hartford, Connecticut

*Counsel for Appellees,*
*Theodore R. Cummings, et als.*